



In the Matter of:

SAYED MANSOUR,

ARB CASE NO. 96-182

COMPLAINANT,

ALJ CASE NO. 94-ERA-41

v.

DATE: September 11, 1997

ONCOLOGY SERVICES CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1994). Before the Board for review is the Recommended Decision and Order (R. D. and O.) of the Administrative Law Judge (ALJ) issued on August 26, 1996. The ALJ concluded that Complainant, Sayed Mansour (Mansour), had failed to establish that Respondent, Oncology Services Corporation (OSC), had violated the ERA by taking adverse action against Mansour in retaliation for engaging in activity protected under the ERA. Specifically, the ALJ concluded that Mansour failed to establish that the protected activity he had engaged in prior to the time at which OSC decided to terminate him played a role in that decision. R. D. and O. at 9-14. The ALJ further found that, following the elimination of Mansour's position in the course of a company reorganization, OSC decided to terminate Mansour, rather than find a different position for him within that company, based on OSC's dissatisfaction with Mansour's job performance. R. D. and O. at 12. The ALJ found that OSC was particularly dissatisfied with the procurement procedures utilized by Mansour and with the inappropriate comments that Mansour had made to, and about, a Nuclear Regulatory Commission (NRC) inspector.^{1/}

^{1/} The ALJ's finding that Mansour suggested to OSC Counsel Marcy Colkitt that OSC should proffer a bribe to Dr. Shanbaky is supported by Colkitt's testimony and by the evidence of Colkitt's subsequent issuance of a memorandum to Mansour and other key OSC personnel regarding the "strict ethical guidelines" applicable to interaction with NRC representatives. Hearing Transcript at 382-89, (continued...)

R. D. and O. at 12-13. The ALJ therefore recommended that the complaint be dismissed.

Based on a review of the record and the arguments of the parties, we conclude that the ALJ's R. D. and O. reflects careful evaluation of the relevant evidence and proper application of pertinent legal authority regarding the timeliness and retaliatory intent issues. Although we adopt the recommendation to dismiss the complaint, we conclude that two issues warrant additional discussion.

The record evidence clearly supports the conclusion of the ALJ, R. D. and O. at 13-14, that OSC established that it was motivated by legitimate reasons in deciding to terminate Mansour. As found by the ALJ, OSC established that Mansour's position was eliminated through the regionalization of its treatment sites, which was accomplished through a reorganization, of which Mansour had been aware since April or May of 1993. Hearing Transcript at 240-43 (Mansour), 296-99 (Derdel), 397-98 (Colkitt); R. D. and O. at 5, 12. In addition, OSC demonstrated that it was concerned about Mansour's performance as assistant to the OSC president, the position in which he was employed for approximately seven months prior to his termination. Hearing Transcript at 295, 299-307, 327, 344-45, 366-67 (Derdel), 379-81, 393-400, 403-04 (Colkitt); *see* R. D. and O. at 6-7, 12-14. One of the legitimate objections to Mansour's job performance that was established by OSC was Mansour's practice of ordering equipment for OSC in his own name. Hearing Transcript at 244-45 (Mansour), 299-304 (Derdel); *see* R. D. and O. at 6-7. As also found by the ALJ, OSC was justifiably alarmed by Mansour's suggestion that the company should offer a bribe to a NRC official. R. D. and O. at 7, 13; *see* n.1, *supra*.

We are concerned, however, by the ALJ's finding that OSC's dissatisfaction with Mansour for remarks that Mansour made to NRC inspector Dr. Shanbaky was unrelated to protected activity, R. D. and O. at 13. Mansour testified that, during a break in the course of an April 1993 NRC inspection of the OSC facility in Harrisburg, Pennsylvania, he shared some rumors with Dr. Shanbaky in what Mansour believed to be an unofficial conversation.^{2/} Hearing

^{1/}(...continued)

394-95; Resp. Exh. 20; *see also* Hearing Transcript at 186-87 (Mansour, testifying that *Shanbaky* had not requested a bribe and that Mansour had not told Colkitt that *Shanbaky* had done so) .

^{2/} The rumors involved two allegations regarding the OSC physics director. First, it was alleged that he was romantically involved with a state or federal nuclear inspector, who allegedly provided improper assistance to him in regulatory matters. Resp. Exhs. 4, 5. The second allegation was that the same OSC manager staged an equipment failure at an OSC radiation treatment site, in order to exaggerate the role of a previous equipment malfunction in the loss of a radiation source while it was being used for patient treatment. *Id.* The ALJ's factual finding that Mansour was "merely gossiping, off the record" is well-supported by Mansour's testimony. Hearing Transcript at 56-59, 157-61, 163-64, 172-76, 253. In addition, Mansour's testimony, as well as other evidence of record, indicates that Mansour knew that the statements regarding OSC staff that he related to Dr. Shanbaky were
(continued...)

Transcript at 52-60, 157-76, 253. In finding that OSC's concern about this conversation was unrelated to any protected activity on Mansour's part, the ALJ relied on Mansour's testimony indicating that he told Dr. Shanbaky of the rumors with "the honest belief that he was merely gossiping, off the record, with a fellow countryman" R. D. and O. at 13. The ALJ further concluded that, in engaging in that conversation, Mansour "exercised undeniably poor judgment," which justified OSC's concern. *Id.* The ALJ's factual findings are well-supported by the evidence of record. *See* n.2, *supra*. The subjects of the rumors related to Dr. Shanbaky by Mansour are not irrelevant to radiation health and safety issues, however. *See id.* In view of the overriding importance of encouraging communications by employees with the NRC regarding safety-related matters, we are reluctant to agree with the ALJ that Mansour's remarks to Dr. Shanbaky were unprotected or that OSC's dissatisfaction with Mansour's exercise of judgment in that instance is wholly unrelated to activity that is protected by the ERA. *See Hill v. Tennessee Valley Authority*, Case Nos. 87-ERA-23/24, Sec. Dec., May 24, 1989, slip op. at 4-5 (noting the "especially compelling need to keep open the channels of communication" for the raising of safety and health issues by employees in the nuclear industry, based on the magnitude of the hazards posed).

We need not determine whether Mansour's relating of rumors to Dr. Shanbaky qualifies for protection under the ERA, however. Assuming, *arguendo*, that the statements at issue qualify for protection, and that OSC's decision to terminate Mansour was thus based, in part, on improper motives, a dual motive analysis would then be reached. *See Evans v. Washington Public Power Supply Sys.*, ARB Case No. 96-065, July 30, 1996, slip op. at 3-4 and cases there cited. In a dual motive analysis under the amended ERA, OSC would be required to establish by clear and convincing evidence that it would have decided to terminate Mansour in the absence of his protected activity, including his remarks to Dr. Shanbaky. *See Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997), *aff'g* *Dysert v. Florida Power Corp.*, Case No. 93-ERA-21, Sec. Dec., Aug. 7, 1995. In this case, the evidence presented by OSC concerning the other reasons that it was dissatisfied with Mansour's job performance is more than adequate to meet that burden. Hearing Transcript at 295, 299-307, 327, 344-45, 366-67 (Derdel), 379-81, 393-400, 403-04 (Colkitt); *see* R. D. and O. at 6-7.

The allegation that Mansour fabricated evidence in support of this complaint also merits comment. Mansour submitted a copy of a memorandum dated April 29, 1993 and addressed to Dr. Bauer, an OSC staff physician, by which Mansour purportedly advised Dr. Bauer regarding restrictions on the use of certain radiation technology under the license granted by the NRC. Compl. Exh. 2; *see* Hearing Transcript at 41-46. OSC challenged the authenticity of the memorandum dated April 29, 1993, and provided evidentiary support for the conclusion that it

²(...continued)

unsubstantiated speculation and that Mansour did not personally believe them to be true. Hearing Transcript at 52-60, 157-76; Resp. Exhs. 4, 5. Mansour also testified that he did not expect Dr. Shanbaky to record Mansour's remarks concerning the rumors and did not expect any action to be taken on them. Hearing Transcript at 56-60, 159-60, 164, 166, 172-73, 175, 176; *see* Resp. Exh. 5.

was typed or printed on the same piece of equipment as Mansour's May 16, 1994 complaint letter to the Department of Labor, Compl't. Exh. 5, which was prepared months after Mansour had left his employment with OSC. At hearing, OSC questioned Mansour regarding how each of these documents was produced. Hearing Transcript at 231-39. Although Mansour's testimony was largely evasive, he did confirm his deposition statement that he had typed the memorandum dated April 29, 1993 at the OSC corporate office. *Id.* at 235; *see* R. D. and O. at 3. Mansour also stated that he did not remember where the May 16, 1994 complaint letter was typed or printed, that he owned neither a personal computer nor a typewriter and that he would either use a typewriter at a friend's house or go to computer stores and use the display models. Hearing Transcript at 232-34.

In further support of its challenge to the authenticity of the memorandum, OSC submitted the opinion of an expert documents examiner that the memorandum dated April 29, 1993 and the May 16, 1994 complaint letter had been "produced by the same typeface element." Post-hearing Brief of OSC, Exhibit 1 (admitted by ALJ on May 20, 1996, *see* May 24, 1996 letter from Griffin memorializing teleconference). Although he rejected OSC's challenge to the authenticity of the memorandum, the ALJ nonetheless agreed that OSC had established that the memorandum and the May 16, 1994 complaint letter were produced by the the same piece of word processing equipment. R. D. and O. at 10. The ALJ did not discuss this finding in connection with Mansour's statements that he had typed the memorandum at the OSC office and had typed the May 16, 1994 complaint letter elsewhere.^{3/} *Id.* Particularly in view of the testimony of Dr. Derdel, who was designated as a copy recipient on the memorandum dated April 29, 1993, that he did not receive a copy of the memorandum, Hearing Transcript at 338-39; *see* R. D. and O. at 3, we question the ALJ's conclusion that OSC had failed to persuade him that the memorandum dated April 29, 1993 was not authentic, R. D. and O. at 10.

In view of our disposition of this complaint, we need not resolve whether or not the memorandum is indeed authentic. We are compelled to note, however, that the fabrication of evidence in administrative proceedings is a very serious matter. Not only does the United States Code provide for prosecution of such an offense, 18 U.S.C. §1505 (1994), but also the ALJ is empowered to exclude parties from proceedings on the basis of unethical conduct, 29 C.F.R. §18.36(b) (1995); *cf. Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1069 (3d Cir. 1996) (noting principle that a party's fabrication of evidence is indicative that his case is weak or unfounded).

On the basis previously stated, we adopt the recommendation of the ALJ and dismiss the complaint.

^{3/} The record contains no suggestion that Mansour had access to the OSC office in May of 1994 when the complaint letter was prepared.

ORDER

It is therefore ordered that the complaint of Sayed Mansour be **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member